State of Colorado

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DPA

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AGENDA
PUBLIC BOARD MEETING
July 19, 2005

A public meeting of the State Personnel Board will be held on **Tuesday, July 19, 2005, at Colorado Department of Transportation, 4201 East Arkansas Avenue, Second Floor Auditorium, Denver, Colorado 80222.** The public meeting will commence at 10:30 a.m.

Reasonable accommodation will be provided **upon request** for persons with disabilities. If you are a person with a disability who requires an accommodation to participate in this meeting, please notify Board staff at 303-866-3300 by July 13, 2005.

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ANNUAL ELECTION OF BOARD CHAIR AND VICE-CHAIR FOR FISCAL YEAR 2005 – 2006

I. REQUESTS FOR RESIDENCY WAIVERS

A. July 1, 2005 Report on Residency Waivers

Reports are informational only; no action is required.

II. PENDING MATTERS

A. David Teigen v. Department of Corrections, State Personnel Board case number 2003B127.

On January 31, 2005, the Initial Decision of the Administrative Law Judge was issued. The Order of the State Personnel Board was issued on June 22, 2005. On June 24, 2005, Respondent filed a Petition for Reconsideration of Board's Decision in Light of Newly Decided Court of Appeals Case. On July 6, 2005, Complainant filed Complainant's Objection, Response and Motion to Strike Department of Corrections' Petition for Reconsideration of the Board's Decision.

III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR ON APPEAL TO THE STATE PERSONNEL BOARD

A. Gilin Jones v. Department of Corrections, State Personnel Board case number 2003B082.

Complainant, a vocational landscape instructor, appealed his termination, seeking reinstatement, back pay, benefits and attorney fees. After hearing, the ALJ found that

Complainant committed the acts for which he was disciplined, including instituting loans to inmates, failing to keep accurate financial records of the facility's greenhouse operations, and violating statutes, Board rules and departmental administrative regulations that prohibit a DOC employee from having a business or financial association with a current offender. In affirming Respondent's disciplinary termination, the ALJ also found that Respondent's action was not arbitrary, capricious or contrary to rule or law because the warden requested an investigation by the Inspector General's Office, asked for an audit of the book keeping for the Greenhouse Program, and gathered and considered the information necessary to make his decision; and the discipline imposed was within the range of reasonable alternatives. On February 16, 2005, the Initial Decision of the Administrative Law Judge was issued. Complainant appealed the Initial Decision of the Administrative Law Judge on March 18, 2005.

Complainant filed his Opening Brief on June 16, 2005, stating as follows:

Complainant:

- Complainant's supervisors had notice of his actions and were aware that he was working on setting up the loan program, contrary to the warden's contention that the supervisors knew nothing at all about the loan program.
- The landscaping program parallels the heavy equipment program; however, the landscaping program run by Complainant did not have a tracking procedure in place until Complainant started implementing one. The landscaping program did have an advisory board and bylaws and the loan form Complainant used was the same as the agreement used in the heavy equipment program, although the money did not go directly to the inmates.
- The actions of Complainant did not have a negative impact on DOC; on the contrary, the program brought positive recognition to DOC.
- The bookkeeping allegations do not support termination, as Complainant was never given notice that any of his practices were unacceptable or a violation of policy.
- The termination of Complainant violated progressive discipline principles, as his performance was consistently rated as standard or above and he never received any corrective or disciplinary action.
- Termination was not within the range of reasonable alternatives, as it was not a case involving the introduction of contraband into a facility, an improper romantic relationship between employees, mismanagement of records, a violation of testing procedures, an escape, public drunkenness, arrest, abuse of sick leave, or a computer incident that jeopardized security.
- The Initial Decision should be reversed and the disciplinary termination rescinded.

Respondent filed Respondent's Answer Brief on July 8, 2005, along with a motion for extension of time.

B. Betty Pinkerton v. Department of Transportation, State Personnel Board case number 2003B115.

Complainant, an administrative assistant, appealed her termination based on failure to perform competently, alleged retaliation for the complaint of sexual harassment she filed against her supervisor one month earlier, and sought reinstatement, back pay, benefits, and attorney fees and costs. Affirming Respondent's actions, the ALJ found that Complainant failed to improve her performance over a period of almost a year by continually exceeding the number of allowable errors within her performance plan; Respondent's action was not arbitrary, capricious, or contrary to rule or law, as Complainant's performance was regularly monitored and reviewed; the discipline

imposed was within the range of reasonable alternatives; and attorney fees are not warranted. On March 9, 2005, the Initial Decision of the Administrative Law Judge was issued. Complainant appealed the Initial Decision of the Administrative Law Judge on April 8, 2005; on June 30, 2005, Respondent filed Respondent's Request that the Board Dismiss Complainant's Appeal and Affirm the Initial Decision of the Administrative Law Judge.

No briefs were filed in the appeal.

C. John J. Deelman v. Department of Education, Colorado School for the Deaf and the Blind, State Personnel Board case number 2005B020.

On December 27, 2004, the Administrative Law Judge issued a Dismissal Order. Following an appeal of that order, Complainant filed his Opening Brief of Appeal on April 13, 2005, in which he requests that the Board reverse the dismissal of his case on the basis of lack of timeliness without good cause, stating as follows:

- There were no defining factors or qualifying points as what is considered good cause that were offered to support the decision to dismiss by the ALJ, thereby showing that the basis for dismissal is "a matter of personal interpretation."
- The definition of good cause from the Colorado Code of Regulations has a broader scope and parameters, allowing for a wide range of variables, mitigating circumstances, considerations, and levels of applicability.
- Due to job-related stress and trauma, Complainant was placed on medical leave on November 7, 2003; his "fitness to return to work" meeting with Carol Hilty, Acting Superintendent at CSDB, took place on May 19, 2004.
- During his absence, he received a letter on January 6, 2004, from Dr. Marilyn Jaitly, Superintendent, stating there were some issues to be addressed in addition to his medical condition, one of which was an email letter sent to all staff on November 8, 2003, which Dr. Jaitly deemed to be inappropriate, hostile, and a violation of violence in the workplace policies and two prior corrective actions.
- During the May 19, 2004 meeting, Complainant discussed his health status, the email, his relationship/involvement with another CSDB employee, and his intention to complete his retirement and purchase PERA service credit in lieu of physically returning to work with Ms. Hilty.
- Following a trip to California, Complainant returned to Colorado on June 6, 2004. On June 8, 2004, Complainant received a letter from CSDB, the notice of disciplinary action or termination letter, dated May 28, 2004.
- Complainant had been set up, lied to, and terminated, which led to "a succession of intense random panic attacks (called "RPA's) [sic] that extended over the next three days."
- Quoting from Employment Law (Covington & Decker), p. 511, Chapter 10, Complainant asserts that in any employment relationship, there are both oral promises and implied promises; he alleges that Ms. Hilty violated the terms of the oral agreement between her and Complainant.
- "The intentional breach of agreement between Ms. Hilty and myself shows that the lack of timeliness, on my part, was an unavoidable occurrence."
- "Therefore, the Lack of Timeliness in filing, by definition, cannot reasonably be attributed to any act or omission on my part as evidenced by the facts" and under the circumstances, no individual could have been reasonably expected to comply with the rules for timely filing.
- In addition, Complainant's response to the Order to Show Cause in November was only one business day late, due to an automobile accident in the State of Nevada, which resulted in Complainant's car catching on fire and his visit to Lake Mead

General Hospital. This situation falls under the category of serious family emergency.

- Complainant requests that his appeal be placed under the jurisdiction of the Board and the Board seriously consider the amount of time and effort he has devoted to the pursuit of the appeal, even while under a doctor's care for anxiety and clinical depression.

On May 2, 2005, Respondent filed Respondent's Second Motion to Dismiss Appeal, requesting that the Board dismiss Complainant's appeal and stating:

- "[C]omplainant has persistently failed to serve copies of his pleadings" on the Assistant Attorney General.
- The Assistant Attorney General did not receive an appeal brief from Complainant.
- If Complainant did file a brief and did not serve the Assistant Attorney General, then it was an *ex parte* communication.
- "Failure to serve a copy on the opposing party may result in dismissal." Board Rule R8-58.
- Complainant was "made aware that the rules require service upon opposing counsel, and that dismissal is one consequence of failure to do so."

On May 18, 2005, Complainant filed additional information. On June 6, 2005, Respondent filed Respondent's Response to Complainant's Filing, essentially stating that the May 18, 2005 filing "has no bearing on any issues that are pending before this Board."

D. Iris Hawkins v. Department of Corrections, Youthful Offender System, State Personnel Board case number 2004B120.

Complainant, a correctional officer, appealed her disciplinary pay reduction and sought reinstatement of her right to apply for a promotion. After hearing, the ALJ determined that Respondent failed to prove that Complainant placed “the program ahead of the completion of good security practices” and she was lax on security; rather, the evidence demonstrated that she was keenly aware of the conflict between case manager and security officer duties, she routinely made constructive recommendations to management on how to increase security at YOS, and there is no factual basis in the record to support a Code of Conduct violation. The ALJ concluded that Respondent’s action was arbitrary and capricious and contrary to rule or law because the warden refused to use reasonable diligence and care to obtain the evidence she needed in order to make an informed decision to discipline Complainant, failed to consider the other serious security breaches that contributed to the escape of two juveniles, and failed to give appropriate consideration to the fact that Complainant was required to be a mentor, counselor, and advocate for the youth. The ALJ ordered that the disciplinary action be rescinded and that Complainant be permitted to apply for promotions, retroactive to the date of discipline. On February 21, 2005, the Initial Decision of the Administrative Law Judge was issued. Respondent appealed the Initial Decision of the Administrative Law Judge on March 21, 2005.

On June 3, 2005, Respondent filed Respondent's Opening Brief on Appeal from the Initial Decision of the Administrative Law Judge, stating as follows:

Respondent:

- The ALJ's Initial Decision is not supported by the evidence and is internally contradictory because in one place the ALJ found that Complainant had missed doing 30-minute rounds and in another stated that Complainant conducted all required counts.
- Complainant admitted that she failed to conduct 30-minute rounds, the disciplinary action rested on that failure, and the ALJ's Findings of Fact found that the evidence established that failure.
- Another contradiction is that the ALJ stated DOC failed to prove Complainant was lax on security; this contradicts the ALJ's finding that Complainant did not conduct the required 30-minutes rounds, a component of facility security.
- The ALJ applied the wrong standard and improperly substituted her judgment for that of the appointing authority.
- The ALJ concluded that Complainant's actions were not serious and flagrant; however, they need only be flagrant or serious to require discipline by rule.
- In addition, Complainant's violations are multiple and include violations of DOC Administrative Regulations, Post Orders, and Youth Offender System policies.
- The ALJ's decision merely reflects her own bias and prejudice against DOC, especially when compared to her decisions in a similar case involving another state department. *See Hall v. Department of Human Services*, Case No. 2002B122.
- The Board must reverse the ALJ's decision, affirm the disciplinary action, and dismiss Complainant's appeal with prejudice.

On June 28, 2005, Complainant filed Complainant' [sic] Response Brief on Appeal from the Initial Decision of the Administrative Law Judge, as follows:

Complainant:

- The ALJ's decision is not nonsensical, is supported by the record, and is not internally contradictory.
- The ALJ did not apply the wrong standard and did not improperly substitute her judgment for the appointing authority.
- The ALJ is not biased and prejudiced against the DOC - this whole argument is ridiculous.

On July 7, 2005, Respondent filed Respondent's Reply Brief, as follows:

Respondent:

- Complainant and the other CO failed to conduct the 30-minutes rounds that were required in the Living Unit Post Order; no rounds were conducted between 7:00 and 9:00 p.m. the night of the escape.
- The ALJ improperly substituted her judgment for that of the appointing authority.
- The Board may examine the ALJ's ruling in prior cases and if it concludes they reveal favoritism or antagonism, it must reverse the ALJ.

E. Pam Cress v. Department of Human Services, Office of Performance Management, Employment Affairs Division, State Personnel Board case number 2005B011.

Complainant, a general professional who worked as Employee Civil Rights Director for Respondent, appealed her termination, seeking reinstatement and discipline less serious than termination if allegations of misconduct were proven at hearing. The ALJ found that the undisputed evidence established that Complainant transported her dog in a state vehicle; she was untruthful with the citizens who owned the dog attacked by her dog, forcing them to find Complainant by tracing the license plate on the state vehicle; she was untruthful with an officer as to the identity of her appointing authority; she did not

complete performance documents for her employees; she filed a civil rights response without getting her supervisor's approval; and she used her state computer for visiting personal websites and sending personal e-mails. Affirming Respondent's disciplinary termination, the ALJ concluded that Respondent's action was not arbitrary, capricious, or contrary to rule or law; the discipline imposed was within the range of reasonable alternatives; and attorney fees are not warranted. On February 25, 2005, the Initial Decision of the Administrative Law Judge was issued. Complainant appealed the Initial Decision of the Administrative Law Judge on March 28, 2005.

On May 17, 2005, Complainant filed her Opening Brief, stating that certain Board rules were violated or ignored in the termination action or were overlooked by the ALJ, making the action arbitrary, capricious, or contrary to rule or law:

Complainant:

- R-6-6 - The basis for a corrective or disciplinary action - Complainant took full responsibility for the Petsmart incident, offered to pay the vet bill, bought a gift certificate for the owners, called the owners, and stated, "There was nothing illegal or harmful done in the entire incident."
- R-6-7 - The appointing authority did not attempt to discuss alternatives in this situation, and furthered her history of "nebulous, incomplete communication" with Complainant, including a lack of performance plan, PDQ, job expectations, training, and guidance.
- R-6-9 - Reasons for discipline are incorrect, as Complainant did not fail to perform competently and did not commit willful misconduct or violation of personnel rules or departmental rules that affect her ability to perform her job.
- R-6-10 - The car reservationist told her on July 12, 2004, that she had been told that Complainant would not be returning to work two days before her responses to information brought into the R-6-10 meeting were due.
- R-6-12 - Complainant never received notice of the disciplinary action; rather, it was sent to an attorney who had accompanied her to the R-6-10 hearing.
- It is not true that Complainant stated she would not pay the vet bill, Complainant did tell Major Mason who her division director was, Complainant's testimony is credible, she did not lie in saying she was not "from here," and Complainant's trustworthiness was not seriously compromised for the agency after the dog bite incident.
- Complainant based her supervision on not receiving any written performance planning or evaluation documents in 1999, 2000, 2001, and 2002; she did not receive specific training on completing PMAPs, and it was not her place to use goals and objectives to complete PMAPs.
- With regard to the CCRD response, Hicks never responded to an email and telephone call by Complainant to enhance the response, Complainant used previous responses in her response and asked CCRD to contact her with questions.
- There is no basis for discipline based on Complainant's personal Internet use.
- She requests that the Board reverse the Initial Decision and termination action.

Respondent filed its Response to Opening Brief on May 18, 2005, as follows:

Respondent:

- Absent a transcript, the ALJ's factual findings must be presumed to be supported by the evidence. *Mayberry v. University of Colorado Health Sciences Center*, 737 P.2d 427 (Colo. App. 1987*); Davis v. State Bd. of Psychologist Examiners*, 791 P.2d 1198 (Colo. App. 1989); *Davison v. Indus. Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004).

- Testimony not included in the record on appeal cannot be considered. *McCall v. Meyers*, 94 P.3d 1271 (Colo. App. 2004*); Brighton Sch. Dist. 27J v. Transamerica Premier Ins. Co.*, 923 P.2d 328 (Colo. App. 1996); *aff'd*, 940 P.2d 348 (Colo. 1997); *Westrac, Inc. v. Walker Field*, 812 P.2d 714 (Colo. App. 1991).
- The ALJ's ultimate findings are supported by the findings that are presumed to be correct in the absence of a transcript and the applicable law. *Gonzales v. Department of Corrections*, Court of Appeals case number 00CA1975 (Colo. App. 2001); *Lawley v. Department of Higher Educ*., 36 P.3d 1239 (Colo. 2001).

On May 24, 2005, Complainant filed her Response to Respondent's Brief, stating:

Complainant:

- If the ALJ's findings are not supported by applicable law and proper acknowledgment of the Board rules, they must be revisited.
- It is not disputed that Complainant transported the dog in the state vehicle, that she was not forthcoming with personal information provided to the dog owners, that there was conflicting testimony as to whether she was asked who her departmental director or appointing authority was, that she did not complete PMAPs for her ex-employees, and that she filed a CCRD response without Hicks' approval.
- "One sentence uttered, in effect, negated all the exemplary time and work and trust given to me by the state. . . The huge leap from a question of 'conscientiousness' to an act of such serious and flagrant nature that it causes the devastation of my career is inconceivable and does indicate arbitrary and capricious actions."

F. Kristina Lanoue v. Department of Corrections, Limon Correctional Facility, State Personnel Board case number 2005B044.

Complainant, a security officer, appealed her administrative termination, seeking reinstatement, back pay, benefits, attorney fees and costs, and placement in a different facility. After hearing, the ALJ found that Administrative Procedure P-5-10 did not apply because Complainant was able to return to work and DOC's Human Resource office had the Medical Certification Form from the treating doctor, which indicated that Complainant could perform the essential functions of her job, but failed to provide that important medical report to the appointing authority before he made his decision to administratively terminate Complainant. Finding that Respondent's action was arbitrary and capricious or contrary to rule or law, the ALJ rescinded the administrative termination, denied Complainant's request for placement in a different facility, and awarded attorney fees and costs to Complainant. On March 10, 2005, the Initial Decision of the Administrative Law Judge was issued. Respondent appealed the Initial Decision of the Administrative Law Judge on April 8, 2005.

On May 12, 2005, Complainant filed her Motion for Contempt Citation, for failing to reinstate Complainant with full back pay and benefits, retroactive to March 9, 2004, less applicable offsets, plus attorney fees and costs. Respondent filed its Response to Complainant's Motion for Contempt Citation on May 23, 2005. On June 2, 2005, Complainant filed a Reply in Support of Motion for Contempt Citation.

On June 16, 1005, Respondent's Opening Brief on Appeal was filed. Respondent alleges, as follows:

Respondent:

- The issues are whether the ALJ erred by denying DOC's Rule 41(b)(1), C.R.C.P. motion to dismiss; whether the ALJ erred in determining that Respondent's administrative termination of Complainant was arbitrary, capricious, or contrary to

rule or law; and whether the ALJ erred in reinstating Complainant to her former position and awarding back pay, benefits, and attorney fees and costs.

- The ALJ erred as a matter of law by not granting DOC's Rule 41(b)(1), C.R.C.P. motion to dismiss; the ruling in the Initial Decision against DOC was based solely on the March 1, 2004 document, which was never introduced in Complainant's case-in-chief, as required by the burden of proof.
- Where there is no basis at that time for rendering a judgment in favor of the Complainant, it is the judge's duty as a matter of law to dismiss the case. *McSpadden v. Minick*, 159 Colo. 556, 413 P.2d 463 (1966).
- The ALJ erred in determining that the March 1, 2004 FML document required DOC to reinstate Complainant because this finding is not supported by the record or the law.
- An appointing authority's decision may only be reversed if the action is found to be arbitrary, capricious or contrary to rule or law. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1253 (Colo. 2001).
- The ALJ erred in awarding Complainant attorney fees and costs because the action was not instituted frivolously, in bad faith, maliciously, as a means of harassment or was groundless.
- Respondent requests that the Board uphold the appointing authority's decision, reverse the ALJ's Initial Decision, and deny attorney fees and costs.

On June 28, 2005, Complainant filed Complainant/Appellee's Brief in Support of Decision of Administrative Law Judge, stating as follows:

Complainant:

- The ALJ was correct as to evidentiary facts, including the cause of Complainant's injury, her return to work in February 2002 without any physician restrictions, her performance of her regular job duties without difficulty, the physical requirements of her job, Kincaide's role as risk management specialist, Complainant's FCE in November 2003, the revision of HealthSouth's report, Dr. Fox's conclusions and opinions, the fact that DOC had the information which Warden Estep says would have qualified Complainant to be reinstated but deliberately ignored it, and Complainant's exhaustion of leave and termination.
- The ALJ was correct as to ultimate conclusions, such as Complainant was performing her job efficiently, medical specialists opined that she was doing well and could work without restrictions, and Dr. Fox told DOC via written form that she could do all her job functions.
- Attorney fees should be awarded to Complainant because DOC insists on making arguments that are stubbornly litigious and disrespectful of the truth, like continuously referring to Complainant's workers compensation award, arguing about the burden on Colorado taxpayers, contending that failure to attend a class on Pressure Point Control Tactics had anything to do with her forced termination, and characterizing her situation as a "15 month paid vacation."
- DOC did not meet its burden of proving the Initial Decision was incorrect; thus, the ALJ's Initial Decision should be upheld.

On July 6, 2005, Respondent filed Respondent's Reply Brief on Appeal, reiterating arguments from the Opening Brief, as follows:

Respondent:

- Complainant failed to meet her burden of proof in a non-disciplinary case.
- Complainant failed to address DOC's Rule 41(b)(1) motion to dismiss.
- Attorney fees are not appropriate.

IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR TO GRANT OR DENY PETITIONS FOR HEARING

A. Benjamin Vialpando v. Department of Transportation, State Personnel Board case number 2005G002.

Complainant petitions the Board to grant a discretionary, evidentiary hearing to review the appointing authority's response to his grievance. Complainant argues that he was denied relief in the appointing authority's Step II grievance decision and that the final agency grievance decision was arbitrary and capricious because John Muscatell, Regional Transportation Director and the appointing authority of Region 6, failed to address Complainant's allegations of discriminatory actions from his supervisor toward him and the hostile work environment which his supervisor has created toward him due to his national origin and ethnic background (Hispanic). Complainant argues that Respondent's actions have resulted in a "tangible loss" of wages by requiring him to work outside inspector functions and by failing to reclassify his position to an appropriate level.

Complainant is a certified Inspector I at CDOT's Traffic and Safety Section in Region 6, whose immediate supervisor is Nashat Sawaged and whose manager is Section Head Jake Kononov. On April 26, 2004, Complainant met with Kononov at Step I of his grievance to discuss:

(1) Job assignment:

- Complainant has continued to take care of the Roadside Outdoor Advertising ("RSA") issues for the region while being given additional job duties in Utilities in the northeast quadrant of the Metro Area and has been functioning at the level of Engineering/Physical Science ("E/PS") Technician (Tech) III since May 2003 in order to receive an upgrade to the E/PS Tech series;
- Complainant has not been given signature authority for Utilities in the past year, although the other three inspectors have it;
- Complainant has the same job duties as the E/PS Tech, but not the authority because he is not in the E/PS Tech series;
- Complainant has requested to return to his original job duties as the RSA Inspector via letter dated April 1, 2004, to Ali Imansepahi;
- Complainant has been told to continue doing Utilities and do only the RSA in the northeast quadrant of the Metro area, but Utilities has become excess work without monetary compensation or status;
- Sawaged made it difficult when Complainant asked for comp time for overtime due to him for the long hours he had worked in the past year and stated that maybe he should follow Complainant around, insinuating that maybe Complainant wasn't working;
- Complainant gave up a lot of extra hours worked and settled on 32 hours of compensation, to be taken one hour at a time, although the others (Greg Sinn and Roger Jameson) have been allowed to take comp time in segments much longer for days at a time;
- Before adding the Utilities job duties, Sawaged did not allow Complainant to take his vehicle home as the RSA Inspector, but other inspectors were allowed to take a vehicle home, informing him, "You can't because you are not like the other Inspectors and you need to report to the office first," implying that Complainant is not equal to serve the same privileges as the others;

(2) Hostile work environment:

- All three supervisors have created a hostile work environment for Complainant and others (Patricia Hayes) by trying to promote Sinn and Jameson, while Sawaged condones it and makes excuses for it;

- Sawaged is "excessively controlling and has a temper that interferes with my job and communication with him. He has created frustration, stress, and unnecessary work for me concerning the Roadside Outdoor Advertising issues";
- Sawaged forces his interpretation of what he thinks are the law and process for RSA, even after they have been explained by Larry Tannebaum, CDOT's attorney, and by Tom Riley, Statewide Coordinator for RSA;
- Communication between Complainant and Sawaged is characterized by tension, including Sawaged's forcefulness which is stressful for Complainant, and Sawaged's borderline threatening tone, yelling, shaking, and angry face;
- Sawaged goes off into different tangents and into religion during discussions with Complainant, and although he states that what is truly in his heart is to help Complainant, Complainant does not believe it;
- Kononov and Sawaged's intention is to get Sinn, Tom Norton's nephew, promoted;

(3) Support and political issues:

- Complainant does not have support from his current supervisors in doing his job as the Region RSA Inspector since Kononov has been Section Manager, is often reprimanded for communication with Headquarters and the Attorney General's office, and is ridiculed, rather than supported;
- Complainant is not allowed to work within the established process between Region 6 and Headquarters for issuing or resolving violations while other regions are allowed to do this;
- The supervisors create unnecessary political negotiations and more work for Complainant when he informs them of violations, which are potential political issues, although there is a process in place that he must follow when violations are issued;
- CDOT is inconsistent in applying the law and allowing the process to unfold;

(4) Advancement and career opportunity:

- Sawaged, Imansepahi, and Kononov have misrepresented the "Career Path Plan" to Complainant, and have taken his expertise in RSA and divided it into two equal areas for Sinn and Jameson (north and south), giving Sinn supervisory authority over Complainant in Utilities and in his own field of expertise and using this for the justification for the Position Description Questionnaire ("PDQ") submittal for an upgrade to the General Professional ("GP") IV level for Sinn and Jameson;
- Sawaged, Imansepahi, and Kononov have worked together to take away Complainant's opportunity for advancement into the GP series, handing it instead to Sinn and Jameson who have no experience or knowledge; the supervisors have manipulated Complainant and his job to justify their discriminatory actions; when Complainant mentions to Sawaged that he needs to oversee the RSA program and train Sinn and Jameson, he is told by Sawaged that he is only there to "give information," but not to supervise or train them; thus, he is made inferior to Sinn so that he can be promoted, and not given any acknowledgement for his efforts to train them; neither Sinn nor Jameson took any interest in learning the program until a few months ago (on January 22, 2004, Sawaged had a meeting with the section regarding RSA and what he expected of all the inspectors, the day after he helped Sinn and James change their PDQ's for GP IV);
- Kononov has made comments that the intent is to promote the Executive Director's nephew (Sinn) first, and his actions have verified this;
- Complainant has taken classes to get training, and has been told to take classes in engineering to advance, while Sinn and Jameson "are handed an opportunity to upgrade to a General Professional IV level with [sic] out having to meet the requirement of education or experience";

(5) PDQ:

- The PDQ's are being revised to reflect the job duties being performed by different individuals who are impacted by the reorganization of the permits unit, as stated by Sawaged;
- The PDQ's being processed are for Sinn and Jameson to get them into the GP IV classification;
- At the start of the reorganization, Complainant's PDQ was changed to the E/PS Tech III series, turned into Human Resources ("HR"), accepted, retracted by supervisors, and changed again since "it did not fit the plan for advancement for Greg Sinn and Roger Jameson";
- The PDQ change was made so all inspectors would be the same, but Complainant was not put into the E/PS Tech series as were the other inspectors;
- Complainant was treated differently, although he tried many times to get Sawaged to understand this was not fair;
- Sawaged asked him to have patience since this was started to help Complainant, but also stated the plan was to help Sinn and Jameson because Hayes had gotten her promotion first and they were trying to "make it right" for everyone;
- On January 21, 2004, Complainant observed Sawaged helping Sinn and Jameson rewrite their PDQ's with direction from Kononov to incorporate wording for the GP IV classification, including language from Complainant's duties as the RSA Inspector;
- No supervisor ever helped Complainant to write his PDQ for his advancement or ever offered to help in any way;
- After Lou Lipp promoted Complainant, Scott and Sawaged agreed that after two years as Inspector I, the upgrade would be into the GP III series, a class that was in line for advancement into the Statewide Coordinator's position concerning RSA, which was Complainant's goal;
- Complainant attended Jones Real Estate College, with CDOT paying half his tuition of $1,100.00 and his cost being $560.00, for the purpose of learning real estate law and to reach his goal of getting to the GP series and eventually qualifying for Statewide Coordinator;
- The GP IV classification's concept and purpose of contacts are similar to Inspector I: an independent contributor with regular work contacts with others outside the supervisory chain;
- As relief, Complainant wants his PDQ resubmitted and supported by the RTD for an upgrade to GP III or better and equality, fairness and non-discriminatory action by supervisors and management;

(6) 3 P Rating:

- The rating does not accurately reflect Complainant's performance, Sawaged blames Complainant for communication problems in the unit, the evaluation comments are not accurate, and the 3 P Plan does not make sense;
- As relief, Complainant wants the evaluation comment removed from his file, an overall rating of outstanding, and a plan that reflects RSA for all of Region 6.

On May 4, 2004, Complainant proceeded to Step II of the grievance when he did not receive a response to Step I of his grievance; Step II reiterated the issues from Step I. Muscatell received and reviewed the Step II grievance; gathered evidence and spoke with Scott, retired former manager of the Statewide Outdoor Advertising Program; and spoke with Complainant's supervisor regarding the needs of overall permits program and organizational changes contemplated to meet business needs. Muscatell reviewed Complainant's official timesheet for the past year and applicable rules which are Administrative Procedure P-3-27, CDOT Policy Directives 265.0 and 265.2; reviewed a draft of a detailed business plan describing the proposed changes prepared by Complainant's supervisors and guidelines sent from Headquarters establishing policy pertaining to the Statewide Outdoor Advertising Program; addressed reclassifications,

promotions and Complainant's performance rating and plan; requested specifics regarding Complainant's allegations of hostile work environment; and stated the RSA Inspector position would be modified with duties consistent with the new business plan and new PDQ but left the possibility open that if it is unacceptable to Complainant, he would be willing to discuss alternatives.

On June 28, 2004, Muscatell denied the Step II grievance, stating that he spoke with Ron Scott who believes there is enough work to support a full time inspector and since Complainant has not been given the responsibility of a responder, he is not authorized to take a state vehicle home under CDOT Procedural Directive 9.1. Muscatell saw no basis to justify paying Complainant retroactively as a Tech III for the previous year and no basis for Complainant's overtime claim, and that it was premature for Complainant to request a move into the GP series until the business plan is completed and that his request must fit the department's business needs. The stand-alone RSA Inspector position would be modified and Complainant's position duties will be changed so they are consistent with the new business plan, including writing a new PDQ for all four inspectors. Muscatell further stated that Complainant's performance rating and plan disputes are not grievable and are not addressed in grievance response and in order for Muscatell to act upon the hostile work environment claim, he would need specifics as to dates, times, locations and exactly what was said and who was present.

Complainant asserts the decision to eliminate or modify the RSA Inspector function as a stand-alone function is arbitrary, capricious and contrary to law because Respondent maintains that stand-alone positions suffer when an employee leaves that position; however, Respondent has proffered no evidence that any stand-alone position has suffered in Region 6 when someone has left the program and no evidence exist to support Respondent's contention that the RSA Inspector position has suffered when one leaves. Complainant argues the Statewide Coordinator has always trained others to perform the RSA functions in all regions and the RSA Inspector position exists in all regions as a stand-alone position. Reallocation of this position provides promotional opportunities for others. Complainant questions whether the Utility Unit is attempting to implement reorganization without delegated authority.

Complainant contends the decision to require him to perform the E/PS Tech functions beyond Region 6 without compensation is arbitrary, capricious and contrary to law because Respondent failed to give consideration to the status of Complainant and take steps to have Complainant perform under his official PDQ or to upgrade Complainant to another PDQ that covered the work actually performed. Complainant argues that the evidence shows Respondent had behaved contrary to law by having Complainant work outside his job duties from May 2003 to the present.

Complainant further contends that the decision or proposal to eliminate or modify the RSA Inspector function is pretext to discrimination against Complainant by using Complainant's position to support the upgrade or promotion for two white males within the department. Complainant asserts he can present evidence of a *prima facie* case of intentional discrimination based on his national origin, Hispanic. Complainant contends he suffered disparate treatment in terms of conditions of employment based upon his national origin. Evidence shows a clear pattern of white males within the unit receiving favorable treatment when compared to Complainant. Complainant alleges he was denied sign-off authority on utility permits he processed, was not provided with assistance in writing a new PDQ while others were encouraged and provided with technical assistance by Respondent's manager, performed the same duties as similarly situated white males, and was denied and upgrade to his position. The denial of any promotions was intentional to keep Complainant at a lower job position so he could be subordinate to a white male and to justify white males' promotions to management and supervisory positions.

The Business Plan proposed is to intentionally justify the reallocation of Complainant's job duties, shifting the significant functions of his position to a white male. The denial or refusal to promote Complainant to E/PS Tech II or III was arbitrary, capricious and contrary to law; Respondent put forth a business plan that justifies Complainant's upgrade to a Tech II position and the plan does not explain why Complainant is qualified to be a Tech II but not qualified in June 2003. The denial or refusal to promote Complainant was done intentionally to discriminate against Complainant because his attempts to rewrite his PDQ received different treatment than PDQ's of similarly situated white employees. PDQ's for the white males were supported by all supervisors and submitted to CDOT's personnel center where they were favorably processed, whereas Complainant's PDQ was never submitted to the CDOT personnel center. Respondent's disparate treatment in the manner in which Complainant's PDQ's were processed when compared to PDQ's of white males in the unit is evidence of intentional discrimination.

Respondent argues that Complainant failed to meet his burden of showing valid issues exist that merit a full hearing. CDOT's personnel specialist determined Complainant did not meet the minimum qualifications for the class series he requested and that his allegations of discrimination are "derived from faulty premises." Respondent asserts the Human Resource specialist reviewed the PDQ and Complainant's qualifications and concluded Complainant did not meet the minimum qualification for the GP III class and that the job duties of his position were correctly classified as the inspector class series.

The minimum qualifications for the GP III class specify, "Graduation from an accredited college or university with a bachelor's degree in a field of study related to the work assignment and two years of professional experience in the occupational field or specialized subject area of the work assigned to the job." The minimum qualifications for the E/PS Tech class series specify, "high school diploma or GED certificate and four years of engineering or physical sciences assistant experience" for E/PS Tech I and for E/PS Tech III position, "seven years of engineering or physical sciences assistant or technician experience."

Respondent asserts Complainant did not meet the minimum qualifications for the E/PS Tech class series in that he does not have four years of engineering or physical sciences assistant experience. One year of "experience" credit has been attributed to Complainant's work in maintenance, an additional six months have been counted for his cross-training in Utilities, and credit will be counted for his continuing work in Utilities based on information submitted by Region 6.

Respondent argues that even with the credit Complainant is still approximately two years short of meeting the minimum qualification for the E/PS Tech I position and had his PDQ been given a formal allocation review and had his position been reallocated to the GP class series, Complainant would have lost the job because the classification goes with the position, not the person. Complainant did not have and does not meet the minimum qualifications for the GP III class. Complainant was advised in April 2003 that CDOT headquarters HR had said Complainant did not meet minimum qualifications for the GP III class. Respondent asserts that in April 2003 Complainant was not told that taking on utilities duties would result in an upgrade to E/PS Tech II and then to E/PS Tech III, nor was Complainant advised that Region 6 management would upgrade him. CDOT headquarters HR personnel specialists decide if a position qualifies for upward reallocation. The decision regarding reallocation of positions of Complainant, Sinn and Jameson to GP class series does not rest with the Respondent, rather with the personnel specialists in the HR office at CDOT headquarters; HR determines reallocation of positions. Respondent further argues the Complainant was told that the addition of utilities work to his experience at CDOT would open a career track with potential to upgrades. Respondent asserts Complainant was offered private tutoring with Kononov;

who teaches at the University of Colorado, which Complainant refused.

Sinn and Jameson are E/PS Tech III's; both men are highly trained in construction engineering and have many years of experience in the field. Respondent asserts, like Complainant, Sinn and Jameson do not meet the minimum qualifications for the GP III class series. The PDQ submitted with Complainant's Information Sheet indicates the requested class title change to GP IV for Sinn and Jameson. Complainant's submission of this PDQ was an informal submission to CDOT HR, as was Complainant's PDQ showing a requested class title to GP III. Because Sinn and Jameson do not meet qualifications for the GP IV class series, they have not been and will not be upgraded from E/PS Tech III to GP IV. Job duties of Sinn and Jameson's positions remain "engineering" and therefore the classification is "engineering" rather than GP.

In May 2004, the Permits Unit took steps to respond to the change in the overall needs of the permits program that had been developing over time. It became clear that organizational changes were necessary to meet changing business needs leading to new goals, including processing more access and utility permits, prioritizing limited resources and intermingling the unit's RSA, access and utilities functions. In early 2004 and in response to the changing business needs of the Permits Unit, Muscatell requested the unit to develop and draft a business plan detailing proposed changes within the unit. Muscatell asked Complainant for input regarding the RSA function, as the RSA function has in the past been a "stand-alone" function in Region 6 Permits Units performed by Complainant.

Based on an in-depth study and analysis of the core business needs of the unit, a Business Plan was drafted on May 17, 2004. After three modifications to the plan, the most recent version dated August 6, 2004, recommends the RSA function no longer to be a "stand-alone" function. Studies of the RSA function in each of CDOT's six regions made and distributed by the Staff Traffic Engineer shows that time spent on RSA duties varied throughout CDOT from 25% (Regions 3, 4 and 5), 30% (Region 1) to 50% (Region 2) and 100% in Region 6, the only region where employee's time is devoted to RSA duties alone.

The Quality Assurance Review (QAR) related to Access Permit Project Design and Construction independently supports the change in business need due to "lack of CDOT staff resources to provide adequate inspection and/or reviews of constructed access permit projects to the state highway system." Complainant stated to Respondent that "for the record" he had "not agreed with any part of" the plan nor did he "agree with it now." Complainant raised issues of permit signing authority and no authority for access and utility permits.

Respondent asserts Complainant's background; experience and CDOT work history does not automatically qualify him for the E/PS Tech class series. The other three members of the Permits Unit currently hold positions in the E/PS Tech class series. Utilities and access permits involve engineering functions within the minimum qualifications and class description of the E/PS Tech class series for which Complainant does not meet the minimum qualifications. Respondent states that Complainant's supervisor asserts that he is not yet ready for permit signing authority for access and utility permits.

Complainant's allegations of discrimination based on national origin are derived from the faulty premises. Complainant did not perform all duties similarly situated white males; rather he cross-trained in some of the duties of the other members of the Permits Unit who are similarly situated in that all of them hold positions and are experienced in the E/PS Tech class series. Complainant was denied an upgrade to the E/PS Tech position because CDOT personnel specialist determined that Complainant did not meet the

qualifications for either the GP class series or the E/PS Tech class series. Respondent argues his statement that the denial of any promotions was intentional and done for the purposes of keeping him at a lower job position so that he could be subordinate to a white male is disingenuous for the same reason and that the Permits Unit Business Plan is a draft in process and Complainant has flatly refused to contribute to the creation of the plan and the development of the plan, which was motivated by documented changes needed of the Permits Unit and was not discriminatory against Complainant.

Respondent contends that Complainant's relief requesting back pay would require that the Board rewrite and reorganize the classified personnel system according to Complainant's dictates and requiring that RSA inspection functions in Region 6 remain distinct from the utilities inspection functions or in the alternative, that RSA be transferred to another work unit within Region 6 would require the Board to assume the direction and control of Region 6 along with management decisions now the responsibility of RTD. Complainant's request to upgrade or reclassify his position to the GP III level would require the Board to rewrite and reorganize the classified personnel system. The request to reassign Complainant to another supervisor would require the Board to assume the direction and control of Region 6 and management decision, which is the responsibility of RTD. Complainant's supervisor, Sawaged, accepted a transfer to Traffic Design Unit effective November 1, 2004. Respondent argues the actions of CDOT do not meet the criteria for an award of attorney fees and costs and that Complainant's request for back pay, the definition and delineation of the RSA inspection functions, the reclassification of his position and request for attorney fees and cost be denied and dismissed.

The ALJ determined that the grievance decision of Respondent addresses the belief by Ron Scott that there is enough work to support a full time inspector, the fact that there is no basis to justify paying Complainant retroactively as a Tech III for previous year or for overtime allegedly worked, and pursuant to CDOT Procedural Directive 9.1, Complainant had not been given authority to take a state vehicle home. Respondent's decision also addresses the hostile work environment claim by informing Complainant the need for specific dates, locations, times and exactly what was said and to who was present. The stand-alone RSA Inspector position will be modified and duties of the position will change so they are consistent with the new business plan and it is premature to address Complainant's request to move into the GP series until the business plan is completed because his request might fit the department's business needs. Respondent's decision states the performance rating and plan is not grievable and will not be addressed.

The ALJ concluded that Complainant's request for a new supervisor is moot. Complainant's supervisor in question has accepted a transfer to the Traffic Design Unit. James Blake manages the Permits Unit on an interim basis. Respondent used reasonable diligence and care to procure evidence that by law authorized to consider in exercising the discretion vested in him and gave candid and honest consideration to the evidence before him in which he is authorized to act in his discretion. Complainant's assertions that: (1) Respondent's decision or proposal to eliminate or modify the RSA Inspector function as a stand-alone function is arbitrary, capricious and contrary to law; (2) Respondent's decision to require Complainant to perform E/PS Technician functions beyond Region 6 prescribed training periods without compensation is arbitrary, capricious and contrary to law; and (3) the denial or refusal to promote Complainant to E/PS Tech II or III on June 2003 was arbitrary, capricious and contrary to law, are merely bare, unsupported statements of purported facts.

Complainant failed to provide information that would show there is an evidentiary and legal basis that would support a finding that Respondent acted in a manner that was arbitrary, capricious or contrary to rule or law. Respondent's actions are based on conclusions made after gathering and carefully reviewing the evidence. The ALJ found that those conclusions are reasonable, fair and honest consideration of evidence and a

reasonable person would not reach contrary conclusions.

The ALJ found that Complainant has not presented evidence that would establish a *prima facie* case of discrimination. Complainant asserts that the decision or proposal to eliminate or modify the RSA Inspector function is a pretext to discriminate against him. Complainant asserts that Respondent used his position to support the upgrade or promotion of two white males within the department. Complainant provides the refusal to promote him to E/PS Tech II or III was done intentionally to discriminate against him. Complainant belongs to a protected class; however, Complainant has failed to establish that he is qualified for the positions he seeks and failed to present evidence that he suffered an adverse employment decision. Failure to reallocate a position upward is not included as an adverse employment action. While a failure to promote may constitute a tangible or materially adverse employment decision, Complainant has not presented evidence that he qualified to be promoted or met the qualifications to be promoted to a position in the E/PS Tech or GP class series or that such failure is causally connected to his protected status.

Complainant made conclusory allegations that other employees who were white received reallocations but he did not; however, Complainant does not describe their duties or any other specific information that might give rise to an inference that the failure to upgrade his position was discriminatory. Complainant failed to address the fact that the allocation determination that he did not meet the minimum qualifications of either the E/PS Tech series or GP class series was made by a team of CDOT personnel specialists. Further, the ALJ found Complainant did not provide any information that those specialists were even aware of his national origin, much less the race of other employees whose positions were being reallocated to E/PS Tech series. Complainant failed to meet his burden of proof relative to establishing an inference of unlawful discrimination. Complainant alleges Respondent created a hostile work environment by trying to promote Sinn and Jameson and allowing his supervisor to use a threatening tone, yelling, shaking, and an angry face in his communication with Complainant. Standards for a hostile work environment claim are high; to demonstrate discriminatory intimidation, ridicule or insult, Complainant must establish discrimination. Without establishing a *prima facie* of discrimination, Complainant is unable to support a claim of discrimination; therefore, his allegations of hostile work environment fail.

On April 8, 2005, a Preliminary Recommendation of the Administrative Law Judge was issued, recommending that a hearing be denied.

B. LaVonne Taylor v. Department of Education, Colorado School for the Deaf and Blind, State Personnel Board case number 2004G029.

Complainant, a certified Nurse II, petitions the State Personnel Board to grant a discretionary, evidentiary hearing to review her supervisor's action of filing a complaint against Complainant's license with the Colorado Board of Nursing. Complainant argues that Respondent's actions are arbitrary, capricious and contrary to rule and law and argues that the complaint was filed against her as means of retaliation in violation of C.R.S. §24-50.5-101 *et seq.,* the Whistleblower Act.

Complainant is an employee of the Department of Education, Colorado School for the Deaf (CSDB), and at times relevant to this appeal, Complainant was working in the school's Student Health Center (SHC). On January 6, 2003, Complainant's supervisor became Nancy Greene, R.N.N.P. On August 12, 2003, Greene filed a complaint against Complainant's license with the Colorado Board of Nursing. On August 18, 2003, the Nursing Board received the complaint in which Greene alleges substandard practice on Complainant's part. Greene's complaint detailed allegations against Complainant with a nine-page chart that included the date that each alleged incident was reported, the name

of the person making the report, the date of alleged incident, a brief description of the alleged incident or report, and the outcome of each incident or report. The complaint detailed Complainant's failure to properly label an envelope containing a student's medication, inappropriate charting in chart noted on several occasions, failure to make chart notation, failure to follow proper procedure regarding medication cards and cups, failure to sign off on medications, failure to take responsibility for Complainant failure to recognize an infection in an immune compromised patient, and Complainant's leaving a vomiting student unattended. In addition to over 70 specific items of concerns, Greene expresses concern because Complainant had done no self-reporting.

On September 18, 2003, the Nursing Board informed Complainant of the complaint filed by Greene by letter, which was received by Complainant on September 24, 2003. Complainant submitted her response to the complaint to the Nursing Board on October 16, 2003.

The Nurse Practice Act allows the Nursing Board to summarily suspend a nurse's license pending further proceedings in only two instances: (1) when "the agency has reasonable grounds to believe and finds that the licensee has been guilty of deliberate or willful violations " or (2) when "public health, safety or welfare imperatively requires emergency action." Greene's complaint resulted in the summary suspension of Complainant's license to practice nursing.

On October 3, 2003, Complainant filed an appeal with the Board, which included a whistleblower claim regarding Greene's complaint filed with the Nursing Board. Complainant alleges the complaint to the Board was arbitrary and capricious. Complainant argues as an employee of the CSDB for 23 years, she has maintained a good employment record until the retaliation for her whistleblowing activity.

Complainant asserts that since 1999 on numerous occasions, she has brought several issues of substandard care, dangerous or illegal practices, communication issues and personality issues to the attention of CSDB. Complainant has expressed concerns of substandard practice, unethical practices, medication impropriety, altering or destroying records, and failing to report sexual assault, and alleges that witnesses and exhibits support other egregious improprieties. Complainant's motivation was for the best interest of the students, SHC staff, and the State of Colorado. The issues she raised placed the students in jeopardy and the staff and State in a position of liability. Complainant argues at least three other nurses in the SHC had vendettas against her for her efforts to make SHC a safe environment for students and staff.

Complainant argues Greene reported her to the Nursing Board based on false and fraudulent information submitted by Jim Heidelberg, Cindy Sturm and Brenda Ernst, while failing to report them for their illegal, dangerous and substandard practice issues and failing to get Complainant's side of the story. Dr. Marilyn Jaitly, in her letter dated October 23, 2002, to Complainant expressed her concerns relating to the management and operations of SHC, including the appropriate performance of nursing duties by SHC staff, communication and lack of team effort, as well as the lack of adequate procedures relating to SHC functions, nursing practices, including the delivery of health services to students, and the difficulty associating responsibility for these concerns with an individual staff member. Dr. Jaitly states that in order to address these issues and "hold all staff accountable to a greater degree," a consultant will be hired to review and assist in the development of adequate policies and procedures related to SHC functions, nursing practices and evaluation of operations of SHC and the provision of written recommendations, staffing changes and specific expectations will be discussed with all SHC staff." The conclusion of the letter states "these recent events/ issues will provide a basis for implementing significant and positive changes in SHC." Complainant argues Dr. Jaitly's decision failed to take into account the retaliatory actions taken against her.

Complainant argues the evidence shows she was dealt with in an arbitrary and capricious manner and was treated differently and more harshly than those she was trying to get to practice safe, ethical and legal nursing. Complainant asserts the complaint submitted by Greene demonstrates she has a pattern of behavior and argues Greene did not observe her, only became aware of behavior second-hand, and raised allegations which were previously brought to the Board's attention. Complainant asserts she was on Family Medical Leave during the time the allegations were brought to the Board and Greene's allegations contain vague, non-specific and unsupported allegations, as set forth in Complainant's October 16, 2003 response to the Board.

Complainant provided the Board with a copy of a statement from a co-worker (who requested that her identity not be disclosed for fear of retaliation from Greene or others at CSDB), indicating that there seems to be a conspiracy to get rid of Complainant. She asserts a former nurse at CSDB was asked to spy on her and that CSDB refused to hear reports of irregularities committed by another CSDB nurse and the reports made to CSDB personnel, supervisors and administration were not reported to the Nursing Board to Complainant's knowledge, although CSDB administrators admit knowing that the practices were occurring and were aware that some of the activities were illegal. Complainant argues the referenced acts of CSDB and its agents are arbitrary and capricious. Complainant requests the report submitted to the Nursing Board be withdrawn and "the pattern of retaliation against her for whistleblowing activities stop" and that she be awarded attorney fees and costs.

Respondent argues that Complainant failed to meet her burden of showing that valid issues exist that merit a full hearing and the action taken by Respondent was not a violation of the Whistleblower Act. Respondent asserts that the complaint submitted by Greene to the Nursing Board sets forth detailed allegations along with supporting documentation of numerous deficiencies in Complainant's nursing duties in the 2002-2003 school year. Complainant's care, pattern and practice of failing to meet generally accepted standards of nursing practice constituted a danger to children. Complainant's whistleblower claim was referred to the Personnel Director for an investigation and the investigator concluded that there was no reasonable basis to indicate Complainant was retaliated against for her whistleblowing activity. Respondent argues the Personnel Director noted that the evidence indicates that the complaint to the Nursing Board was not submitted in response to any alleged disclosure to the Nursing Board but rather "in response to Complainant's work performance."

The ALJ found that Respondent's actions were not arbitrary and capricious based on the evidence. It cannot be said Respondent neglected or refused to use reasonable diligence and care to procure evidence and information it is authorized to consider in making a decision to file a complaint against Complainant's license with the Nursing Board. Greene's complaint and detailed chart contained specific allegations against Complainant. The chart makes it apparent that Greene use reasonable diligence in gathering and considering all relevant evidence before making her decision to file a complaint. The ALJ finds Complainant's own Information Sheet acknowledges that the Nursing Board summarily suspended her license. Complainant's license could not be summarily suspended unless "the agency has reasonable grounds to believe and finds that the licensee has been guilty of deliberate and willful violation or that the public health, safety or welfare imperatively requires emergency action." Based on the evidence reasonable persons fairly and honestly considering the evidence would not reach a conclusion contrary to that reached by Respondent in filing a complaint against Complainant's license with the Nursing Board.

The ALJ determined that Complainant seeks relief, which does not include a finding of liability against Greene, requests to have the complaint withdrawn and the "pattern of

retaliation against her for whistleblowing activities stop," and requests attorney fees and costs. The ALJ found that the investigator for the Department of Personnel and Administration concluded there is no reasonable basis for Complainant's whistleblower complaint and Complainant does not have a constitutional or statutory right to a hearing based on Board Rule R-8-27.

Complainant's disclosures regarding dangerous and illegal nursing practices, if true, are examples of the types of disclosures contemplated by the Whistleblower Act. Section 24-50.5-103(2) C.R.S. requires Complainant to make a subsequent disclosure to someone other than her supervisors or appointing authority. She has satisfied this obligation and in addition to disclosing the information regarding substandard nursing practices to her supervisors, Complainant made disclosures to a number of other people. Some of those disclosures were made subsequent to disclosures made by Complainant to her supervisors. Complainant has established that her disclosures constitute a protected disclosure pursuant to the Whistleblower Act. Complainant must establish that her protected disclosure was a substantial and motivating factor for the complaint Greene filed against Complainant's license. However, Complainant failed to establish her disclosures motivated Greene in any way and the complaint filed with the Nursing Board reported many specific examples of substandard nursing practice of Complainant's behalf that Greene personally observed or that were reported by others.

The ALJ concluded that given the specificity and careful documentation of each item of concern and the fact the Nursing Board summarily suspended Complainant's license after receipt of Greene's complaint, the complaint filed with the Board of Nursing was well founded as evidenced by the summary suspension. Greene was not motivated by Complainant's disclosures when her complaint was filed with the Board of Nursing, but by her performance and reports of substandard nursing practices on Complainant's part.

On April 15, 2005, a Preliminary Recommendation of the Administrative Law Judge was issued, recommending that a hearing be denied.

V. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR

A. Wynonna Mahaffey v. Department of Corrections, State Personnel Board case number 2005B053 (June 20, 2005).

Complainant, a parole officer who rose to the position of supervisor, appealed her demotion based on failure to appropriately manage those she supervised, and sought rescission of the disciplinary demotion, reinstatement to her former position, and attorney fees and costs. Affirming Respondent's actions, the ALJ found that Complainant was a topnotch parole officer, so successful in the position that she was moved up the chain of command, but despite Respondent's dedicated efforts to mentor Complainant as a manager, Complainant never adjusted to the Team Leader position. In fact, the demands of the position so overwhelmed her that she was on edge most of the time, unable to be calm, thoughtful, and unemotional in her supervisory role; instead, she often snapped at others because she was under so much stress, and the position was so challenging to Complainant that it impaired her judgment in managing her own case load. The ALJ ruled that the demotion was not arbitrary, capricious, or contrary to rule or law, and Complainant was not entitled to an award of attorney fees and costs.

[The deadline for appealing the Initial Decision of the Administrative Law Judge is July 20, 2005.]

B. Monica Cowan v. Department of Human Services, State Personnel Board case number 2005B018 (June 27, 2005).

Complainant, an accounting technician, appealed her two-day disciplinary suspension, alleging that she was discriminated against on the basis of race, and sought reinstatement of the two days of suspension, reimbursement of lost wages, and an award of attorney fees and costs. After hearing, the ALJ concluded that as an overseer of timekeeping, Complainant failed to keep the timesheet spreadsheet updated on a daily basis and filed the timesheets she received without logging them into the spreadsheet on the computer. In addition, Respondent's discipline was not arbitrary and capricious, as the appointing authority imposed discipline upon Complainant after a thorough investigation, reviewed all documentation, and gave Complainant an opportunity to provide mitigating information. Finally, affirming the disciplinary suspension, the ALJ ruled that Respondent did not discriminate against Complainant on the basis of race and she is not entitled to an award of attorney fees and costs.

[The deadline for appealing the Initial Decision of the Administrative Law Judge is July 27, 2005.]

C. Christopher Enriquez v. Department of Corrections, Arkansas Valley Correctional Facility, State Personnel Board case number 2005B068 (July 6, 2005).

Complainant, a correctional officer, appealed his disciplinary demotion, seeking reinstatement to the position of sergeant, back pay and benefits, and an award of attorney fees and costs. After hearing, the ALJ found that Complainant committed the acts for which he was disciplined, including violating the Staff Code of Conduct and regulations barring contraband in the facility and demonstrating a lack of judgment with respect to maintaining professional boundaries with inmates; the appointing authority's action was not arbitrary, capricious, or contrary to rule or law; and attorney fees are not warranted. The ALJ affirmed Respondent's action and dismissed Complainant's appeal.

[The deadline for appealing the Initial Decision of the Administrative Law Judge is August 5, 2005.]

VI. REVIEW OF THE MINUTES FROM THE JUNE 21, 2005 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

VII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS JUNE 21, 2005 PUBLIC MEETING:

A. David Teigen v. Department of Corrections, Colorado Territorial Correctional Facility, State Personnel Board case number 2003B127.

The Board voted to adopt the findings of fact and conclusions of law and to adopt the Initial Decision and make it an Order of the Board.

B. Victor Pochon v. Department of Human Services, Colorado Mental Health Institute at Fort Logan, Nursing Service Administration, State Personnel Board case number 2005G064.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing.

C. Chanel Elaine Boyce-Dixon v. Department of Human Services, Colorado State Veterans Home at Fitzsimons, State Personnel Board case number 2005G055.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and grant the petition for hearing.

VIII. REPORT OF THE STATE PERSONNEL DIRECTOR

IX. ADMINISTRATIVE MATTERS & COMMENTS

A. ADMINISTRATIVE MATTERS

- Budget Reports and Revenue and Expense Report
- Cases on Appeal to the Board and to Appellate Courts
- Cases Scheduled for Preliminary Review
- Web Site Statistics

B. OTHER BOARD BUSINESS

- Board election
- Change of Board meeting location
- Pam Sanchez, new General Counsel for the
- State Administrative Court Performance Commission

C. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC

X. EXECUTIVE SESSION

A. Case Status Report

B. Minutes of the June 21, 2005 Executive Session

C. Other Business

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NEXT REGULARLY SCHEDULED BOARD MEETINGS - 10:30 a.m.

August 16, 2005	**Colorado State Personnel Board 633 17th Street, 14th Floor, Courtroom 1 Denver, CO 80202**
September 20, 2005	**Colorado State Personnel Board 633 17th Street, 14th Floor, Courtroom 1 Denver, CO 80202**
October 18, 2005	**Colorado State Personnel Board 633 17th Street, 14th Floor, Courtroom 1 Denver, CO 80202**
November 15, 2005	**Colorado State Personnel Board 633 17th Street, 14th Floor, Courtroom 1 Denver, CO 80202**
December 20, 2005	**Colorado State Personnel Board 633 17th Street, 14th Floor, Courtroom 1 Denver, CO 80202**
January 17, 2006	**Colorado State Personnel Board 633 17th Street, 14th Floor, Courtroom 1 Denver, CO 80202**
February 21, 2006	**Colorado State Personnel Board 633 17th Street, 14th Floor, Courtroom 1 Denver, CO 80202**
March 21, 2006	**Colorado State Personnel Board 633 17th Street, 14th Floor, Courtroom 1 Denver, CO 80202**
April 18, 2006	**Colorado State Personnel Board 633 17th Street, 14th Floor, Courtroom 1 Denver, CO 80202**
May 16, 2006	**Colorado State Personnel Board 633 17th Street, 14th Floor, Courtroom 1 Denver, CO 80202**
June 20, 2006	**Colorado State Personnel Board 633 17th Street, 14th Floor, Courtroom 1 Denver, CO 80202**